

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of RANDALL J. CEPEDA, Deceased.

CRUZ CEPEDA, Personal Representative of the
ESTATE OF RANDALL J. CEPEDA,

Plaintiff-Appellee,

v

ST MARY'S OF MICHIGAN,

Defendant,

and

MID-MICHIGAN SURGICAL SPECIALISTS,
P.C., TODD R. RICHARDSON, M.D., SUNIL
PADIT, M.D., and ZAKIR QURESHI, M.D.,

Defendants-Appellants,

and

ROBERT GUTTORMSON, M.D.,

Defendant.

CRUZ CEPEDA, Personal Representative of the
ESTATE OF RANDALL J. CEPEDA,

Plaintiff-Appellee,

v

ST. MARY'S OF MICHIGAN,

Defendant-Appellant,

UNPUBLISHED
October 18, 2011

No. 299855
Saginaw Circuit Court
LC No. 10-008145-NH

No. 299952
Saginaw Circuit Court
LC No. 10-008145-NH

and

MID-MICHIGAN SURGICAL SPECIALISTS,
P.C., TODD R. RICHARDSON, M.D., SUNIL
PADIT, M.D., ZAKIR QUERSHI, M.D., and
ROBERT GUTTORMSON, M.D.,

Defendants.

CRUZ CEPEDA, Personal Representative of the
ESTATE OF RANDALL J. CEPEDA,

Plaintiff-Appellee,

v

ST. MARY'S OF MICHIGAN, MID-MICHIGAN
SURGICAL SPECIALISTS, P.C., TODD R.
RICHARDSON, M.D., SUNIL PADIT, M.D.,
and ZAKIR QURESHI, M.D.,

Defendants,

and

ROBERT GUTTORMSON, M.D.,

Defendant-Appellant.

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

In these consolidated appeals, defendants-appellants [hereinafter defendants] appeal as of right the trial order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants on the ground that plaintiff's medical malpractice action was filed after the limitations period had expired. Specifically, defendants object to language in the order indicating that the dismissal was "without prejudice" and not an adjudication on the merits. We reverse and remand for entry of an order granting summary disposition with prejudice pursuant to MCR 2.116(C)(7).

The material facts are not disputed. Randall J. Cepeda was admitted to St. Mary's Hospital for a cholecystectomy on August 13, 2007. Cepeda died as a result of postoperative complications on August 19, 2007. Plaintiff was appointed personal representative of Cepeda's

estate on November 28, 2007, and delivered to defendants a notice of intent to sue on October 2, 2009. Plaintiff filed her complaint in Saginaw Circuit Court on March 10, 2010.

Defendants moved for summary disposition, arguing, in relevant part, that the statute of limitations barred plaintiff's complaint because she failed to file her complaint within either the applicable two-year limitation period for malpractice actions, MCL 600.5805(6), or within two years after being appointed the personal representative of Cepeda's estate under the wrongful death savings provision, MCL 600.5852. Following a hearing on the motions, the trial court granted defendants' motions, but granted the motions without prejudice "as it appears that plaintiff still has time to refile pursuant to the wrongful death savings provision."

Defendants argue that the trial court erred by granting their motions for summary disposition without prejudice and by specifying in its order that the dismissal did not constitute an adjudication on the merits. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7), accepting plaintiff's well-pleaded allegations as true and construing them in plaintiff's favor, to determine whether the complaint was timely filed. *Estate of Dale*, 279 Mich App 676, 683; 760 NW2d 557 (2008). This Court also reviews de novo questions of statutory interpretation and the application of statutes of limitation. *Id.*

In general, a plaintiff in a medical malpractice case must bring a claim within two years of the accrual of the claim. MCL 600.5805(6); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). A medical malpractice claim must be preceded by the filing of a valid notice of intent (NOI). MCL 600.2912b. With certain exceptions, the notice of intent must precede the filing of the complaint by at least 182 days, *Id.*, and the filing of the NOI tolls the statute of limitations by 182 days. MCL 600.5856. When, as in this case, a person dies before the period of limitations has run, the personal representative may commence an action under the wrongful death savings provision within two years of the issuance of letters of authority, but must bring the action within three years after the original two-year period of limitations has run. MCL 600.5852.¹ Our Supreme Court has held that the wrongful death savings provision is not a

¹ The wrongful death savings provision in MCL 600.5852 provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of a deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

statute of limitations or repose, and is not tolled by § 5856. *Waltz v Wyse*, 469 Mich 642, 650-651; 677 NW2d 813 (2004).²

Here, the alleged malpractice occurred no later than August 19, 2007. The limitations period would have expired, at the latest, on August 19, 2009. If a suit had been commenced before August 19, 2009, the limitations period would have been tolled. Because no suit was filed within the limitations period, no tolling of the statute of limitations was available. However, the savings period in MCL 600.5852 provides that the personal representative may bring an action at any time within two years after letters of authority are issued, but no later than three years after the period of limitations has run. Plaintiff was appointed personal representative on November 28, 2007. She had until November 28, 2009, in which to file suit during the saving period. *Liggon v Crittenton Hosp*, 285 Mich App 337, 351-355; 776 NW2d 361 (2009). Because plaintiff's complaint was not filed until March 10, 2010, the trial court properly dismissed plaintiff's action under MCR 2.116(C)(7) as untimely.

The trial court dismissed this case without prejudice and with language indicating that the dismissal was not an adjudication on the merits, however, on the ground that time remained under the savings provision for the appointment of a successor personal representative to pursue an action against the same defendants. Although the trial court cited no legal authority for its decision, at the hearing on the motions plaintiff cited *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), in support of her argument that a successor personal representative has an additional two years to bring a claim, as long as it was brought within three years after the period of limitations has run. Plaintiff reasoned, therefore, that a personal representative has five years from the date a cause of action accrues to bring a claim. However, in *Eggleston*, the Supreme Court addressed "whether a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute, MCL 600.5852, or whether the two-year period is measured from the appointment of the initial personal representative." The Court concluded that a successor personal representative has a new two-year period in which to file a medical malpractice case from the time he or she is granted letters or authority, as long as he or she acts within three years after the period of limitations has run. *Id.* at 30. *Eggleston* is factually distinguishable, however, because the initial personal representative in *Eggleston* never filed a claim. See also *Estate of Dale*, 279 Mich App 676 (a successor personal representative is entitled to his or her own two-year saving period after the original personal representative served a full two-year term *but failed to file a claim within that time*). Thus, the issue of whether dismissals based on the statute of limitations should be with or without prejudice was not addressed at all.

On a different but related issue, this Court rejected the plaintiffs' assertion that the trial court should have permitted a voluntary dismissal without prejudice, rather than to have summarily disposed of an untimely complaint on limitations grounds, so that a new personal representative could be appointed to file suit on behalf of the estate. *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005), rev'd on other grounds 480 Mich 978; 741 NW2d 840

² Plaintiff acknowledged that *Waltz* is binding, but argued that *Waltz* was wrongly decided.

(2007). Although *McLean* was subsequently reversed, the reversal was limited to the impact of *Mullins v St. Joseph Mercy Hosp*, 480 Mich 948; 741 NW2d 300 (2007).³ The Supreme Court's order in *McLean* notes that the remainder of the application for leave to appeal was denied because the Court was not persuaded that the "remaining questions presented should be reviewed by this Court." *Id.* Thus, the above holding in *McLean* arguably remains good law on that issue.

No binding authority exists that stands for the proposition that a cause of action may be "revived" by the appointment of a successor personal representative when the original suit by the original personal representative was dismissed as untimely. The Michigan Supreme Court's decision in *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), undermines the notion that notwithstanding an original personal representative's filing of an untimely complaint, a successor personal representative has the authority to pursue an action against the same defendants. In *Washington*, the original personal representative filed an untimely complaint that the circuit court dismissed pursuant to MCR 2.116(C)(7), and the plaintiff, a later-appointed successor personal representative, also filed a complaint on the estate's behalf. *Id.* at 415. The Supreme Court held that a successor personal representative is barred by res judicata from filing a subsequent complaint when the first is dismissed on statute of limitations grounds. *Id.* at 417-422.⁴ See also *Verbrugghe v Select Specialty Hosp-Macomb Co, Inc (On Remand)*, 279 Mich App 741, 744; 760 NW2d 583 (2008).

In the present case, plaintiff received letters of authority on November 28, 2007. Thus, plaintiff had two years from that date in which to commence a lawsuit. Plaintiff filed her lawsuit more than two years after receiving her letters of authority. Consequently, plaintiff did not file her complaint within the saving period afforded her as the personal representative under MCL 600.5852. Defendants were entitled to summary disposition because plaintiff failed to file her

³ *Mullins* is not relevant to the present case. In *Mullins*, the Court created a "window of opportunity" in which the rule in *Waltz*, 469 Mich 642, would not be applied. The window of opportunity was limited to those causes of action filed between the date of *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), overruled by *Waltz*, 469 Mich 642, and within 182 days of the decision in *Waltz*. This "window" closed 182 days after April 14, 2004, or October 14, 2004.

⁴ Plaintiff attempts to distinguish *Washington*, 478 Mich 412, on the ground that the order of dismissal in that case did not state whether the dismissal operated as an adjudication on the merits. Citing *Al-Shimmari*, *infra* 477 Mich 280, plaintiff contends that the dismissal of a claim based on the expiration of a limitations period constitutes an adjudication on the merits pursuant to MCR 2.504(B)(3) only if the court does not otherwise specify in its order. However, the court also overruled its prior decision in *Rogers v Colonial Fed S & L Ass'n*, 405 Mich 607; 275 NW2d 499 (1979), to the extent that *Rogers* suggested that a motion for summary disposition on statute of limitations grounds does not operate as an adjudication on the merits. *Al-Shimmari*, 477 Mich at 296. Thus, *Al-Shimmari* supports the conclusion that a dismissal based on statute of limitations grounds is an adjudication on the merits.

claim within the period established by the Legislature. An order granting summary disposition based on the statute of limitations is an adjudication on the merits. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 284, 285; 731 NW2d 29 (2007). Thus, defendants are entitled to a dismissal with prejudice. Dismissal without prejudice was inappropriate in this case because defendants would conceivably be subject to the relitigation of plaintiff's claim if a new personal representative was appointed to act on behalf of Cepeda's estate. Being subject to a second suit that would otherwise be barred under the doctrine of res judicata would be legally prejudicial to defendants. The trial court abused its discretion by granting plaintiff's request for dismissal without prejudice.

Reversed and remanded for entry of an order granting summary disposition with prejudice pursuant to MCR 2.116(C)(7). Jurisdiction is not retained.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck